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In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The judgment and memorandum opinion of the court of appeals (Pet. App. 1a-2a, 1b-2b) are not reported. The opinion of the Interstate Commerce Commission is reported at 350 I.C.C. 391.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission correctly ruled that an "association of shippers" within the meaning of Section 402(c) of the Interstate Commerce Act, 49 U.S.C. 1002(c), may not include another shippers' association as a member.

2. Whether the Commission properly issued its ruling without resort to the procedures specified in the license

revocation section of the Administrative Procedure Act, 5 U.S.C. 558(c).

STATEMENT

Under Section 402(a)(5) of the Interstate Commerce Act, as added, 56 Stat. 284, and amended, 49 U.S.C. 1002(a)(5), freight forwarders are common carriers which specialize in assembling and consolidating small shipments for the general public and in performing break-bulk and distributing services with respect to such consolidated shipments. See *Investigation into the Status of Freight Forwarders*, 339 I.C.C. 711, 713-714. See also *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 345-346. Section 410(a) of the Act, 49 U.S.C. 1010(a), requires that freight forwarders operate under a permit issued by the Interstate Commerce Commission. Section 402(c) of the Act, 49 U.S.C. 1002(c), provides that the regulatory provisions governing freight forwarders do not apply to the operations of *bona fide* shippers' associations in consolidating or distributing freight for their members on a non-profit basis.

In 1973, the Commission initiated an investigation to determine whether petitioner Sunshine State Shippers and Receivers Association, Inc. ("Sunshine") was a *bona fide* shippers' association or whether it was operating as a freight forwarder without a permit, in violation of Section 410(a).

After hearings, the Administrative Law Judge found that Sunshine was not a *bona fide* shippers' association because its membership included other shippers' associations. The Commission's Division 1 adopted this finding and ordered Sunshine to cease providing freight forwarder services without proper authority. 350 I.C.C. 391. The court of appeals affirmed *per curiam* (Pet. App. B).

ARGUMENT

1. Petitioners contend (Pet. 6-14) that since the statutory provisions regulating freight forwarders do not apply to associations of shippers, they also do not apply to associations whose membership includes other shippers' associations. The court of appeals properly held that the Commission's ruling to the contrary is a reasonable interpretation of Section 402(c). As the court noted, nothing in the language of the Act suggests that Congress contemplated associations of associations of shippers (Pet. App. 1b).[1] Moreover, as the court of appeals also observed, "a line between freight forwarders and shippers associations must be drawn somewhere, and the function of line-drawing is normally one left to the sound discretion and expertise of the agency" (Pet. App. 2b). The Commission is entitled to deference in its interpretation of the statute which it administers.

If petitioners' construction of Section 402(c) were accepted, a single nationwide shippers' association, composed primarily of other smaller associations, might eventually represent and serve all or nearly all domestic shippers. Such a sweeping organization providing forwarding services for large numbers of unrelated shippers was not envisioned by Congress when it excluded associations of shippers from the coverage of statutory provisions regulating freight forwarders.

Legitimate shippers' associations, whose members pool their shipments to secure the benefits of volume rates, are not subject to Commission regulation as freight forwarders because they do not hold themselves out to the

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[1]Had Congress wished to cover such entities, it could have done so explicitly. See, *e.g.*, Section 402(b) of the Act, 49 U.S.C. 1002(b), expressly excluding federations of agricultural cooperative associations from regulation as freight forwarders.

general public as common carriers. Members are usually located in a single geographical area and are frequently concerned with the shipment of a particular kind of freight. The operations of a shippers' association are controlled by the association's members and the members assume all risks connected with the shipment of their freight. See *Columbia Shippers and Receivers Ass'n., Inc.* v. *United States*, 301 F. Supp. 310, 316 (D. Del.); *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692, 696 (S.D. N.Y.).

By contrast, freight forwarders are independent venturers, controlling their own operations and assuming the risks associated with transporting the freight of their customers. They publish their own tariffs for a through transportation service from origin to destination. The Commission correctly determined that Sunshine was not a *bona fide* shippers' association because the individual shippers who used its services neither controlled its operations nor assumed the risks entailed in the movement of their goods.[2] 350 I.C.C. at 404-405, 407-408.

An additional argument supports the Commission's ruling. Under Section 402(c)(1), *bona fide* shippers' associations may serve only their own members. Where petitioner Sunshine handles freight for a member of petitioner New Jersey Shippers Pooling Association, Inc. ("New Jersey"), this requirement is not met. The actual shipper served by Sunshine, though a member of New Jersey, is not itself a member of Sunshine.

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[2]The Commission also found that Sunshine did not adhere strictly to the statutory requirement that an association of shippers operate on a non-profit basis. In retaining a portion of the spread between single shipment and volume rates of underlying carriers, Sunshine behaved as a freight forwarder. See 350 I.C.C. at 405-407.

Finally, contrary to petitioners' prediction (Pet. 9), the Commission's ruling will not produce dire consequences for smaller industries. At oral argument in the court of appeals, the Commission acknowledged that petitioner Sunshine could comply with the cease-and-desist order simply by enrolling the members of its member associations as members of Sunshine itself (Pet. App. 1b). The Commission also assured the court that, if such a strategy were adopted, members of another shippers' association who also joined Sunshine could appoint that other association (*e.g.*, petitioner New Jersey) as their agent to oversee their interests in Sunshine (Pet. App. 1b-2b). Thus, whatever benefits small shippers may derive from the membership of their association in a shippers' association like Sunshine will still be available under the Commission's ruling.

2. Petitioners assert (Pet. 15-17) that, under the Administrative Procedure Act ("APA"), 5 U.S.C. 558(c), they were entitled to an opportunity to comply with the Commission's statutory interpretation prior to the issuance of the cease-and-desist order. Section 558(c) requires such an opportunity before any "license" is withdrawn, suspended, revoked, or annulled. As the term is defined in the APA, 5 U.S.C. 551(8), "license" includes "an agency permit, certificate, * * * statutory exemption or other form of permission." Sunshine had not been granted any such license by the Commission. Under the language of the Interstate Commerce Act itself, the permit requirements applicable to ordinary freight forwarders do not apply to *bona fide* shippers' associations. It is not necessary for the Commission to confer any exemption on a *bona fide* shippers' association, and the Commission conferred no such exemption in this case.

The Commission proceeding was designed solely to determine whether Sunshine's operations were such that Sunshine might be characterized as an "association of shippers" within the meaning of Section 402(c). The Commission's negative answer to that question and its cease-and-desist order designed to terminate Sunshine's violations did not revoke or suspend any "license" held by Sunshine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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